United Steelworkers of America, AFL-CIO-CLC, District No. 38 (American Bridge Division of United States Steel Corporation) *and* Harry A. Sivley, Jr. Case 21-CB-7544

May 14, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On December 18, 1981, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We note that the Administrative Law Judge inadvertently referred to September 21, 1980, rather than January 21, 1980, as the date that Charging Party Harry A. Sivley, Jr., claimed he was given to decide whether he would accept a position as bundler. This inadvertent error does not affect our agreement with the Administrative Law Judge's conclusions.

[2] We agree with the Administrative Law Judge's conclusion that the Respondent did not violate Sec. 8(b)(1)(A) of the Act by refusing to process the grievance of Charging Party Sivley to arbitration. In so doing, however, we find it unnecessary to rely on the Administrative Law Judge's lengthy discussion and analysis of the merits of Sivley's grievance at sec. III,B, pars. 12–15, of his Decision as such analysis is not essential to the resolution of the issue before the Board in this case. See, e.g., *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979), which the Administrative Law Judge himself correctly cited.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at Los Angeles, California, on September 15 and 16, 1981,[1] pursuant to a complaint issued by the Regional Director for Region 21 on December 24, which is based on a charge filed by Harry A. Sivley, Jr. (herein called the Charging Party or sometimes Sivley), on November 10. The complaint alleges that United Steelworkers of America, AFL-CIO-CLC, District No. 38 (herein called Respondent), has engaged in certain violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (herein called the Act).

Issue

The issue presented is whether Respondent's failure to process Sivley's grievance to arbitration was based on racial factors, personal animosity, or preference for another employee who would have been adversely affected by Sivley winning his grievance.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

Respondent admits that the Employer, American Bridge Division of United States Steel Corporation, is a Delaware corporation engaged in the business of fabricating structural steel and that, until on or about March 15, the Employer had a facility located in City of Commerce, California. It further admits that during the past year, in the course and conduct of the Employer's business, the Employer sold and shipped goods and products valued in excess of $50,000 to customers outside the State of California. Accordingly, Respondent admits, and I find, that the Employer is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Prior to April 1979, the Employer had operated its plant in Commerce, near Los Angeles, for several years. Respondent was the certified bargaining representative of the Employer's production and maintenance employ-

[1] All dates herein refer to 1980 unless otherwise indicated.

ees numbering in 1979 about 600 employees. The most recent collective-bargaining agreement between the parties was effective between August 1, 1977, and July 31. (G.C. Exh. 2.) In addition to the collective-bargaining agreement, the Employer and Respondent were parties to a memorandum of understandings and special provisions applicable to the Los Angeles plant, which is a local memorandum to the national agreement. (G.C. Exh. 3.) Section 8 of that document makes reference to section X of a 1962 agreement between the parties, as amended by an agreement of July 11, 1963. (G.C. Exh. 4.)

On or about April 24, 1979, the Employer announced that it would close its Los Angeles (Commerce) facility, gradually laying off employees as operations wound down. By January, the unit had diminished to approximately 100 employees. The plant actually closed on or about March 15, when the final group of employees was released.

One of the employees affected by the plant closure was Charging Party Harry A. Sivley, a member of the unit referred to above. Hired in April 1956, Sivley was working as a general inspector in January. Since 1964, Sivley was president of Local 2058, chartered by Respondent to represent the employees at the Employer's City of Commerce facility. In addition to being president of the Local, Sivley was, between 1970 and 1980, a member of the plant's general grievance committee, and for part of the time was chairman of that committee. In his role as grievance committeeman, Sivley was responsible for representing grievants and presenting Respondent's position up through the third step of the four-step grievance procedure. For the fourth step and for subsequent arbitration, where applicable, Respondent's representative since January 1968 was Chris Gellepis, whose formal title was staff representative. Gellepis, on behalf of Respondent, had sole authority to decide which cases, denied through the fourth step, should be taken to arbitration.

A witness at the hearing, Gellepis credibly testified that most cases denied at the fourth step are not taken to arbitration. Frequently, however, he will file notice of Respondent's intent to take a case to arbitration. Then, after his full review on the merits, the case will be withdrawn. This procedure is necessary because of time constraints, 30 calendar days, between denial of a grievance at the fourth step and the requirement for filing the appropriate notice of intent to take a case to arbitration. Since Gellepis services 13–14 plants, he is not always able to make an informed decision before the time limit expires.

Another witness at the hearing was Robert Petris, the immediate superior of Gellepis. For 5 years director of District 38, Petris described himself as a personal friend of Sivley. Under Respondent's established procedures, any grievant dissatisfied with Gellepis' decision, either in refusing to take a case to arbitration or in withdrawing a case from arbitration before decision, had a right to appeal to Petris, who had the power to overrule Gellepis. According to Petris, there are no written guidelines as such as to when a case should be taken to arbitration. However, in deciding this question for individual cases, Gellepis should become familiar with the position of the parties as developed in the first four steps of the grievance procedure. Then he should research the precedents established by prior arbitration hearings, being careful not to take a nonmeritorious case to arbitration, thereby setting a bad precedent. In terms of expense, it costs Respondent about $600 to take an average case to arbitration, not including the transcript and lost time for witnesses.

The particular facts giving rise to the instant case began on or about January 5, a Saturday. Sivley was one of two employees then working as a general inspector, a classification 15 job. The other employee so employed was Benny Perez, recording secretary for the Local. Sometime on the day in question, Robert Caulfield, plant superintendent, called Billy Pollard, superintendent of the Company's employee relations for the past 11 years. Caulfield told Pollard that the work in the plant had declined so that only one general inspector was required. Since both Sivley and Perez had preferential or superseniority under the agreement based on their status as officers of the Local,[2] Caulfield requested advice on how to handle the matter. Since Pollard had not faced the issue before either, he consulted with his supervisors at company headquarters in Pittsburgh, Pennsylvania. He suggested to them that, since both Sivley and Perez had superseniority, the Company should rely on natural, i.e., plant, seniority. After consultation in Pittsburgh, Pollard's supervisors called him back and agreed with his suggestion. Perez was senior to Sivley in the plant by several years. Pollard notified Caulfield, who notified Sivley that he was being demoted from general inspector to bundler, a classification 5 job.[3] Caulfield told Sivley

[2] Sec. 13-I ("Seniority Status of Grievance Committeemen and Local Union Officers") reads as follows:

> When management decides that the work force in any seniority unit in any plant is to be reduced, the member of the plant grievance committee, if any, in that unit shall, be retained at work and such hours per week as may be scheduled in the department in which he is employed, provided he can perform the work of the job to which he must be demoted. The extent of this provision is to retain in active employment the plant grievance committeemen for the purpose of continuity in the administration of the labor contract in the interest of the employees so long as a work force is at work, provide that no grievance committeeman shall be retained in employment unless work which he can perform is available to him in the plant area which he represents on the grievance committee.
>
> This provision shall apply also to employees who hold any of the following offices in the local union or unions in which the employees of the plant are members: President; Vice President; Recording Secretary; Financial Secretary and Treasurer.

[3] Sivley testified that he was given this notice during a heated disagreement between himself and Caufield over another matter involving union business. The other matter is irrelevant except to the extent it could indicate arbitrary action by the Employer, not a party to this proceeding. Caulfield never testified. However, I credit Pollard as to his prior conversation with Caulfield and therefore find no need to decide whether Caulfield conveyed to Sivley notice of the latter's demotion in the context described by Sivley.

However, I must discredit a portion of Sivley's testimony regarding a subsequent conversation with Caulfield: contrary to Sivley's testimony, I find that he argued only that he had seniority rights over Perez to keep his present position, but I do not credit Sivley's testimony that at this time he raised the issue of reversion rights to a job higher than bundler. When Sivley filed his grievance on January 8, there was no mention of reversion rights, nor is there evidence that he mentioned his theory at the

Continued

to report for duty as a bundler on January 7, the following Monday, and that if he had any further questions he could call Pollard.

Sivley left work that day and, according to his testimony, that evening he had a conversation with his wife, who was employed as office secretary and bookkeeper for the Local. Mrs. Sivley did not testify, but her husband testified that she asked him to begin reviewing financial records of the Union and preparing certain reports of the Union which were required to be filed with the Federal Government due to the plant closure. Sivley allegedly agreed to this request and, ultimately, worked on union business for the next 2 weeks. Part of the work he performed was the responsibility of Ted Moreno, financial secretary for the Local. Sivley stated that he was asked by Moreno to do this work because he, Sivley, was better at it than Moreno and because Moreno had other matters to attend to.[4]

On Monday, January 7, Sivley did not report for work as a bundler. Instead, he called the plant guard and reported that he would be out on union business. Sivley did not tell the guard when he would be returning to work nor say anything about the bundler job. According to Sivley, based on custom and practice, it was not required for the union official to state when he would be returning to the job.[5]

Sometime in the late morning on January 7, Sivley called Pollard and asked for an explanation of his demotion. Sivley explained that under the local seniority agreement (G.C. Exh. 4) he would be unable to serve as grievance committeeman if he left the plant. Pollard explained that Sivley was not leaving the plant, but was only being demoted to bundler. Sivley ended the conversation by saying, "Okay, I will hear from you."

On January 8, Sivley, accompanied by Fred Martin, a member of the Local and, like Sivley, a grievance committeeman, held a meeting with Caulfield and Pollard. There is a conflict as to what was said. All agree that initially each side generally reiterated its position: Sivley argued that he should be retained as general inspector, and Pollard and Caulfield contended that he was required to take the bundler job or go on layoff. The witnesses are in conflict as to the later conversation. I resolve the credibility issue as follows: I find that Sivley stated that he would refuse to accept the bundler job. Despite Sivley's and Martin's testimony that there was an "understanding" or "agreement" to allow Sivley time to think it over, I find there was no such agreement.[6] If there had been, the parties would have had to discuss Sivley's status during the interim period. No such discussion occurred and there is no evidence that Pollard and Caulfield knew that Sivley was off from work on union business as of January 7. Moreover, since an incumbent bundler would have to be bumped to make way for Sivley, this issue would have to be discussed and resolved. No such evidence was presented. Not only was there no agreement reached, but, also, Sivley could not reasonably have believed that such an agreement was reached.

What did happen was that, subsequent to the meeting, Sivley filed a formal grievance, for which the prior meeting constituted a first-step meeting. The grievance reads as follows:

> Management is in violation of local seniority agreement, Section 10, Exhibit A and B, Sub-section G, Marginal Para 122, 123 and 125-A, by denying Grievant gainfull [sic] employment within the plant, in his job classification(s). Reinstate Grievant and make whole for all monies lost plus any and all fringe benefits that will accrue during the term of this violation.
>
> /s/ Harry A. Sivley, Jr. 40887
>
> Employee's signature
>
> /s/ Fred Martin
>
> Committeeman's signature
>
> /s/ Robert Caulfield
>
> Foreman's signature [G.C. Exh. 5.]

Meanwhile, in light of Sivley's refusal to take the bundler job, Pollard returned to his office and processed a layoff form through the accounting department. Company records (personnel summary) indicate that as of January 8 Sivley was on layoff. (Resp. Exh. 4.) The entry on company business records further contradicts Sivley's claim that he was given until September 21 to decide whether to accept the bundler job and corroborates Pollard's testimony that no such agreement was reached.

On January 14, Sivley first discussed his grievance with Gellepis by telephone. After Sivley explained his theory, Gellepis responded, "Well, maybe you had better

first-step grievance hearing on January 8 or at the second-step grievance hearing on January 21. This theory was never advanced until the third-step hearing on February 14.

[4] Moreno testified at the hearing, but no one raised this matter with him. Contrary to Sivley's testimony, I have substantial doubts that his absence from his employment for 2 weeks was unrelated to his demotion. I note that Sivley had time while being paid by the Union to work on union business to call Pollard on January 7 to discuss his demotion; he also had time on January 8 to meet with Pollard and have a first-step grievance hearing. I find that Sivley was absent from the plant between January 7 and January 20 primarily as strategy to avoid taking the job as bundler. During the 2-week period, Sivley was paid by the Union at his inspector rate of pay.

[5] Again, I do not believe Sivley on this point. The Union had several officers and committeemen. It is impossible to believe that any or all of them could call on a morning they were required to report for work, state without more that they would not be in due to union business, and never inform management when they would be returning. In Sivley's case, he was scheduled to report to a new position, where, according to Pollard's credible testimony, an incumbent bundler would have had to be bumped to make way for Sivley. These additional facts make it even more improbable that Sivley called in on January 7 solely to report that he would be off from work on union business.

[6] Martin was not completely a disinterested witness. Prior to January 5 he was demoted from his job along with Moreno. Sivley went to Pollard and convinced him that Martin and Moreno should have new jobs as bundlers rather than as lower rated helpers. Martin was clearly in sympathy with Sivley's position and supported him through the grievance procedure. While I do not find that he intentionally misstated facts in his testimony, I find that his testimony of an understanding with Pollard of time for Sivley to decide on the bundler job was not based on objective facts, but rather was the result of wishful thinking and deliberately vague and unclear statements by Sivley. Since both Sivley and Martin were experienced union grievance negotiators, they knew what was necessary to reach a hard agreement with the Company. No such agreement was present here.

take the bundler's job." Meanwhile, Sivley continued to work on union business until January 18. On or about that date, he received a letter from the International Union, removing him and all other officers of the Local from office due to the pending plant closure. Gellepis was appointed administrator of the Local with exclusive power to sign checks and make other decisions regarding activities of the Local, including within his discretion the power to reappoint officers. This action by Respondent was based on the pending plant closure and was unrelated to Sivley's grievance. It did not indicate any misconduct of Sivley.

On the following Monday, January 21, Sivley reported to the plant, showed his identification card to the guard, asked for and received a timecard, and reported to the foreman of the bundler department. Sivley began to work as a bundler for a brief period of time until observed by Caulfield, who immediately called Pollard. Caulfield asked whether Sivley had received permission to return to work as he was in the plant working. Pollard told Caulfield that Sivley had been laid off as of January 8 and that he should be brought to Pollard's office. Sivley went there and was told by Pollard that the Company considered him to be on layoff, but that, as long as he was there, Pollard would agree to a second-step grievance hearing 1 day earlier than originally agreed to by the parties on January 8. Again the parties restated their positions and at the conclusion of the meeting the Company again denied the grievance. (G.C. Exh. 5.) Thereafter, both sides submitted their respective summaries of the second-step meeting. The union record prepared and signed by Sivley stated in part:

> On January 8, 1980, Management notified the grievant . . . that he was being reassigned to bundler, and that he could either accept the position or leave the plant. The grievant refused to accept the assignment.[7]

The company record, dated February 1, stated in part, "The grievant refused the demotion [to bundler] and was laid off on January 8." (G.C. Exh. 8.)

On or about January 21, after the second-step grievance hearing, Gellepis met with Sivley at the Local's office.[8] Sivley again restated his position, including that he would not accept the bundler's job. Gellepis restated his position that the grievance was without merit. Gellepis, then the administrator of the Union, testified that he told Sivley:

> [T]hat job belongs to Benny Perez under the contract, and also I did tell that, under the Consent Decree[9] it is mandated that plant seniority be used . . . .

On or about January 24, a second meeting occurred at the Local's office. This time Gellepis and Sivley were joined by Moreno, financial secretary of the Local. Gellepis stated that since Sivley was laid off he could no longer work as grievance committeeman, so Moreno was appointed to replace him in that position and Henry Espinosa was appointed to replace him as grievance committee chairman. Then Gellepis reappointed Sivley as president of the Local, although without the power to sign checks and vouchers. Again the subject of Sivley's grievance arose and Gellepis reiterated his belief that Sivley had no case. Gellepis commented that Perez had him on three counts: seniority, preferential seniority, and minority status.[10] At this meeting, in response to Sivley's question, Gellepis stated that he had not yet decided who would be attending a union "Sound Off" meeting in Pittsburgh, Pennsylvania.[11] Later that week, Gellepis told Sivley that he would not be permitted to go to Pittsburgh due to the financial condition of the Local and because the content of the meeting was not that important. Sivley complained to Petris, Gellepis' superior, about the refusal to permit the trip. Petris discussed the matter by telephone with Gellepis, telling him of Sivley's complaint, but also stating that Gellepis had exclusive authority to decide who from the Local should attend. Subsequently, Gellepis did allow Sivley to attend the meeting because he had decided that officers of another union facing plant closure should attend. While the condition of the finances of the other local were much better, Gellepis said he felt that, to be fair, he would change his mind as to Sivley. He denied any pressure from Petris.

On February 14, the third-step grievance hearing was held. At this time, Sivley raised for the first time an issue regarding reversion rights.[12] Again the Company denied the grievance. (G.C. Exhs. 9 and 9a.)

After the third-step meeting, the five-member local grievance committee held a meeting to discuss Sivley's grievance. Martin and one other member felt the griev-

[7] Contrary to the statement in G.C. Exh. 7, Sivley first learned of the demotion on January 5. Also contrary to a statement in G.C. Exh. 7, purporting to show that an agreement had been reached at the first-step hearing allowing Sivley until the second-step hearing to decide whether to take the bundler's job, I have found above that no such agreement was ever reached and that there was no basis for Sivley reasonably to believe that such an agreement was reached.

[8] Gellepis described two meetings the week of January 21, while Sivley described only one on January 24. While it is immaterial whether more than one meeting occurred, I find that there were two meetings.

[9] The consent decree, dated April 12, 1974, binds both the Employer and Respondent to use plant seniority for all purposes in which there is an issue regarding layoffs, transfers, promotions, etc. Where it is in conflict with the basic agreement, it supersedes it. The purpose of the consent decree is to increase the job retention, promotion, and transfer opportunities of minorities.

[10] Sivley testified that Gellepis used the expression, "I favor minorities." Gellepis denied using the expression at the hearing, but stated in an affidavit to a Board agent that he may have used the expression. Moreno, who testified for the General Counsel, supports Gellepis' testimony on this point. Thus, I find that Gellepis never said he "favored minorities." As will be more fully discussed below, even if Gellepis used the expression, there is overwhelming evidence either that he was merely expressing his desire to abide by the consent decree, or that, if stating his personal view, such did not affect his judgment of the merits of Sivley's grievance.

[11] Sivley testified that he was told by Gellepis at this time that he would definitely not be going. To resolve this credibility problem, I again turn to Moreno, who supports Gellepis' version. Thus, I credit Gellepis on this point.

[12] Under this alternative theory, to be further discussed in the "Discussion and Conclusions" of this opinion below, if Sivley were not entitled to remain as a general inspector, he was entitled to revert to a higher rated job than bundler.

ance had merit; the three other members of the committee felt it lacked merit. Nevertheless, the committee decided unanimously to request Gellepis to appeal the grievance to the fourth step. Although possessing complete discretion as to which grievances to take to the fourth step, and having stated his opinion on several occasions that Sivley's grievance lacked merit, Gellepis took the grievance to the fourth step. (G.C. Exh. 10.)

On or about May 9, Gellepis called a union caucus to discuss Sivley's grievance and the seven-eight others scheduled to be heard in a few days. In attendance besides Gellepis and Sivley were the members of the Local's grievance committee and the other grievants. Gellepis again restated his opinion that Sivley's grievance lacked merit and also stated that Sivley's case would be affected by the issue of Sivley's having accepted or refused the bundler's job. Gellepis also restated his view that Perez was a minority with preferential seniority.

On May 14, the fourth-step grievance hearing was held at the plant personnel office. Facing Gellepis on behalf of the union grievants was W. G. Stewart from the Employer's headquarters in Pittsburgh. Gellepis allowed Sivley to argue his own grievance. Then the Union met in a caucus and Gellepis told Sivley that the case would not be going to arbitration, but that Gellepis would ask the Company to settle the case for $500.[13] When the offer was presented to Stewart, he replied that he would consider it and reply later.

On June 2, the Company denied Sively's grievance at the fourth-step meeting. Subsequently, the Company prepared the fourth-step record, including the summary of the Company's contractual analysis (G.C. Exh. 13) and the summary of the Union's contractual anaysis (G.C. Exh. 18.) The Union's analysis was approved by Gellepis on June 26. Under the terms of the agreement, Gellepis had 30 days from June 26 in which to file for arbitration of Sivley's grievance. (G.C. Exh. 2.)

On October 5, 1980, Sivley wrote a letter to Petris which reads as follows:

> Dear Bob:
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> As of this date, Local Union 2058 Administrator and International Staff Representative, Chris Gellepis has failed to notify me the status of my Grievance AB-LA 80-2, which was heard in the 4th Step of grievance procedure during May, 1980.
>
> I have been informed by Bill Pollard, Supt. Personnel Admin. for American Bridge, that my grievance was not appealed to the board of arbitration under time limits outlined in Labor Agreement and that he considers my grievance "closed."
>
> Bob, if this information is correct, then this letter constitutes an appeal for payment of all wages and incentive benefits ($3,600.00), auto and phone expenses thru 9-30-80 ($226.50) lost due to the negligence of Mr. Gellepis.
>
> Your friend,
>
> /s/ Harry A. Sivley, Jr.

On October 20, Petris acknowledged receipt of Sivley's letter and stated that an investigation was being conducted. (G.C. Exh. 12.) On November 6, Petris wrote a letter to Sivley which reads as follows:

> Dear Harry:
>
> An investigation has been made of your complaint in your letter of October 15. Enclosed is a copy of Representative Gellepis' report.
>
> I am in accord with his report. If you wish to discuss this further with me, please call my secretary to schedule a convenient time to come in and talk to me about the matter.
>
> Sincerely and fraternally,
>
> /s/ Robt. J. Petris

In the October 28 cover letter of the report of Gellepis sent to Petris and sent by Petris to Sivley, Gellepis states in part:

> (b) Harry Sivley was notified by me repeatedly that he had "no grievance" and that I was not going to arbitrate his case. In the presence of the grievance committee during a caucus in the Fourth Step meeting of May 14, 1980, I declared that I would NOT arbitrate the Harry Sivley grievance. I told the Committee that the Inspector job belonged to the Recording Secretary, Ben Perez, and that Harry Sivley had no right to refuse the bundler's job
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> . . . .

B. *Analysis and Conclusions*

I begin by noting that the General Counsel does not attack Respondent's initial processing of Sivley's grievance under the contractual grievance procedure. The General Counsel does contend that, since on or about June 26, Respondent violated the Act by its refusal to process Sivley's grievance to arbitration (br., p. 13). However, no violation of the Act could have occurred prior to on or about July 26 because Respondent had 30 days from June 26 to file its notice for arbitration of Sivley's grievance.

The General Counsel has made a second, more serious, error reflected in a two-part argument, p. 13 of his brief: first, that his initial burden was to show that Sivley's grievance was clearly not frivolous, and, second, that he satisfied that burden. In my judgment, the General Counsel is wrong on both counts.

In support of his first contention, the General Counsel cites the Board's holding in *The Buffalo Newspaper Guild, Local 26, American Newspaper Guild, AFL-CIO (Buffalo Courier-Express, Inc.)*, 220 NLRB 79 (1975). This case was distinguished and explained by the Board in the later

[13] Sivley denied that Gellepis told him that the case would not be going to arbitration. I credit Gellepis' testimony here. In light of Gellepis' view of Sivley's grievance which he had expressed on several occasions, I believe that it was likely for him to make the statement. Indeed, if Gellepis had not stated it, Sivley would have asked, just as he had done regarding the Pittsburgh trip. Moreover, both Martin and Moreno were present at the fourth-step meeting and neither was asked about the matter by counsel for the General Counsel. For the same reasons, I do not believe Sivley's testimony that, in early June, he asked Gellepis what he planned to do about the grievance.

case of *Glass Bottle Blowers Association of the United States & Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979). There, the Board scolded the Administrative Law Judge for making the same error made by the General Counsel in the instant case and stated (at 324):

> Examination of a grievance for the limited purpose of determining whether or not it is "clearly frivolous" is not, however, the first step in a far-ranging inquiry into the merit or importance of the grievance. Nor should it be. Where, as here, a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the disposition of the grievance was . . . motivated by ill will, or other invidious considerations.[14]

This is not to say that the question of whether a particular grievance lacks merit should be ignored. I will find below that Sivley's grievance was indeed "clearly frivolous." However, the discussion must commence with the motivation of the Union which I consider below, beginning with some additional principles of Board law.

In *Central States, Southeast and Southern Areas Pension Fund d/b/a Three Hundred South Grand Company*, 257 NLRB 1397, 1399 (1981), the Board stated:

> A union's duty of fair representation requires it to serve the interests of all the employees it represents fairly and in good faith and without hostile discrimination based on unfair, arbitrary, irrelevant, or invidious distinction. In the performance of this duty, however, the effective administration of a contract requires that a union be afforded broad discretion in deciding what grievances to pursue and the manner in which they should be handled.

More specifically, an employee does not have an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective-bargaining agreement.[15]

With the above law for guidance, I find in this case that Respondent's refusal to process Sivley's case to arbitration was based not on ill-will or other invidious considerations; rather, at all times relevant to this proceeding, Respondent acted in the utmost good faith. In this case, Respondent acted (primarily) through Gellepis, its staff representative for 35 years.

The General Counsel makes much of Gellepis' alleged comment on January 24 that he favored minorities. I have found above that Gellepis never made that exact statement, but it is likely that he stated something close to it. I will even assume, *arguendo*, that the exact statement was made as Sivley testified. Yet it does not support the General Counsel's case.

First, I find that Gellepis' alleged remark indicated nothing more than his desire to recognize the dictates of the consent decree (Resp. Exh. 5). Even as the General Counsel concedes (br., p. 14), the consent decree "requires the Employer and Respondent to utilize plant continuous service for all purposes in which a measure of continuous service is being utilized in order to increase the promotional and transfer opportunities of female and minority employees . . . ." It should be noted that on May 14, almost 3 months after the alleged remark, Gellepis authorized, in his discretion, the fourth-step grievance procedure. It is clear that Sivley himself did not believe that Gellepis was discriminating against him when the alleged remark was made. He had every right to appeal then or later to his friend Petris, who was the immediate superior of Gellepis. Indeed, Sivley did just that when he felt that he was being unfairly precluded from attending a union "Sound Off" meeting in Pittsburgh. No such appeal was ever made to Petris with respect to Gellepis' alleged remark. Accordingly, for the reasons cited above, I must conclude that said alleged remark does not support the General Counsel's case.

In the same way that Gellepis' desire to observe the letter and spirit of the consent decree is no evidence against the Union, neither is the personal relationship between Gellepis and Perez. The former admitted that he was friends with Benny Perez and liked him. This is no evidence of discriminatory intent. Gellepis flatly denied that race was a factor in refusing to arbitrate Sivley's grievance and I credit this denial based on his demeanor and the surrounding facts or circumstances of this case.

But the General Counsel also contends (br., p. 15) that there was evidence of personal animosity between Sivley and Gellepis. Sivley testified that in 1976 or 1977 Gellepis disagreed with certain actions which Sivley took as president of the Local. Gellepis wrote a letter critical of Sivley and had it read at a meeting of the Local. Gellepis recalled the incident and explained that it concerned a pattern of spending by the Local in excess of receipts, thereby violating the Union's constitution. In *Carpenters, Local Union #1104 (The Law Company, Inc.)*, 215 NLRB 537 (1974), the Board noted evidence of some antagonism between a union member and his business agent. This, said the Board, was an insufficient basis to conclude that the business agent's conduct was motivated by the hostility between the two men. The Board found that the General Counsel had not proven by a preponderance of the evidence that the respondent's refusal to represent the member with respect to his discharge was arbitrary, discriminatory, or in bad faith. The complaint was dismissed.

In the present case, the proof is also lacking. First, the dispute between the two men was stale, 3–4 years old, and there was no evidence of any continuing acrimony over the years. Next, Gellepis reappointed Sivley as president of the Local on January 24. Also, Sivley was permitted to travel to Pittsburgh, Pennsylvania, for a union gathering as well as to San Francisco and Sacramento for other matters concerning union business. Gellepis had authority to prevent Sivley from making these trips, particularly since the finances of the Local were not bountiful. Furthermore, while Gellepis repeatedly expressed his view to Sivley that the latter's grievance lacked merit, he never conveyed this opinion to the Em-

[14] See also *Laborers International Union of North America, Local 324, AFL-CIO (Centex Homes of California, Inc.)*, 234 NLRB 367, 371 (1978).

[15] *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

ployer's representatives.[16] To the contrary, at the fourth-step meeting, Gellepis offered to settle with the Employer for $500. In addition, I again note that Sivley never appealed to Petris on the grounds that Gellepis' hostility toward him was affecting his treatment of the grievances. Nor is there evidence that Sivley ever complained to his friends and supporters, Martin and Moreno, that Gellepis was discriminating against him.

Finally, I note the testimony of Petris that Gellepis should not bring to arbitration grievances that lack merit, lest a bad precedent be established.[17] In this respect, I agree with Gellepis that Sivley's grievance lacked merit and, for that reason, find Respondent further supported in refusing to take the grievance to arbitration. I turn now to consider said grievance on its merits.

I begin by looking to the contentions of the General Counsel, who states (br., p. 12), "Sivley ultimately relied upon three arguments in support of his grievance: (1) that he, rather than Perez, was entitled to retain the general inspector position on the basis of 'super-seniority' arising out of his status as a general grievance committeeman; (2) that he was entitled to a higher classification than the bundler position based upon his retention and/or reversion rights; and (3) that he was entitled to continue to work in the bundler job which he had commenced working in on the morning of January 21, 1980."

With respect to the first contention, the General Counsel acknowledges (br., p. 12) that the collective-bargaining agreement does not expressly provide for "super-superseniority" for general grievance committeemen. Yet, in a *non sequitor*, the General Counsel argues that Sivley's argument has a logical basis. If a matter is not expressly set forth in the agreement, nor implied by any reasonable construction as I find, then what matter if it has a logical basis. Indeed, Sivley's argument has no logical basis anyway. It is true that paragraph 125(c) of section X (the 1962 local agreement) (G.C. Exh. 4)[18] prohibits anyone other than current employees from serving as grievance committeemen. However, as Sivley himself conceded in his testimony, when he called Pollard on January 7 to ask for an explanation of the demotion and cited to Pollard section 125(a) of the local agreement, Pollard replied, "You are not leaving the plant, you are going to be a bundler, and that is the way it is going to be." Accordingly, Sivley's right to continue as grievance committeeman was unaffected by the demotion to bundler. Furthermore, the Company's decision to rely on plant seniority where both Sivley and Perez were similarly situated was rational and nondiscriminatory. Accordingly, this element of Sivley's grievance was clearly frivolous as he had no right under the circumstances to retain his job as general inspector.

With respect to Sivley's second contention, the General Counsel candidly states (br., pp. 12–13) that this "is the least persuasive of his [Sivley's] arguments," and "that Sively mistakenly believed that there were higher rated jobs than bundler to which he was entitled." The evidence introduced at the hearing showed not only that Sively was not entitled to a higher rated classification than bundler, but that he was not even entitled to a bundler position. Sively relied on the appendix to the local agreement (G.C. Exh. 4, p. 66) to argue that he was entitled to a job as a material checker rather than as a bundler. However, in the early 1970's the Company replaced its reversion with a new two-part system. The first of these listed each employee by name (Resp. Exh. 3). Under Sivley's name is listed his present job as general inspector. Pollard testified that Sivley also had prior experience as a machine shop inspector which was omitted by error. However, this job did not exist as of January. Having obtained a particular employee's current and past experience, it is possible to turn to a second document (Resp. Exh. 1) listing those jobs to which an employee had reversion rights. Under this list, Sivley as a general inspector (516) had reversion rights only to a job as general helper, a position which, as of January, had been broken down to 31 different jobs.[19] Whether these 31 different jobs included the job of bundler is arguable and need not be determined here. Even though the Union never agreed to Respondent's Exhibits 1 and 3, the evidence shows that the Company implemented them without protest either by Sivley or the Union. Accordingly, Sivley's rights, if any, to a job higher than bundler are determined by reference to these two documents which are valid based on custom and usage. In light of the discussion above, I find that Sivley had no rights to a higher job classification and this aspect of Sivley's grievance is "clearly frivolous."

Finally, with respect to Sivley's third contention, I find that he voluntarily waived whatever rights he had to the bundler job. I have determined above that the Employer through Caulfield and Pollard never agreed to give Sivley until January 21 to decide whether to accept the bundler job. This is a matter of credibility resolution as the General Counsel admits (br., p. 13). When Sivley left the first-step grievance hearing on January 8 without accepting the bundler's job, and without telling the two supervisors that he was off from work on union business, he automatically reverted to layoff status. This finding is supported by company business records. Accordingly, I find this third and final aspect of Sivley's grievance to be clearly frivolous.

For all of the reasons stated above, I will recommend that this case be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Employer is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting conmerce within the meaning of Section 2(6) and (7) of the Act.

[16] Compare *Truck Drivers, Oil Drivers, and Filling Station and Platform Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974), affd. 532 F.2d 1169 (7th Cir. 1976).

[17] Cf. *Consolidated Aluminum Corporation*, 258 NLRB 281 (1981).

[18] In pertinent part, this sec. reads, "An employee who is in layoff shall not act as a grievance committeeman."

[19] Pollard testified that Sivley was not even entitled to the job as bundler because a general helper classification ran from job class 3 to job class 6. Apparently only job class 3 jobs were still in existence as of January. However, the Company had previously agreed, at Sivley's request, to demote Martin and Moreno to bundlers rather than to galvanizing helpers and the Company felt it had to do the same for Sivley himself.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX A

Name	*Classification*	*Yr.*	*Qtr.*	*Hrs. wrkd.*	*Health & Welfare Pension & Apprentice-ship Training Fund contribution at $2.01 per hr.*	*Industry Program Contribution $.18 per hr.*
Ralph	Journeyman	1979	4	139.00	$279.39	$25.02
Ortiz	Bricklayer	1980	1	135.75	272.86	24.44
			2	165.50	332.66	29.79
			3	0		
			4	0		
		1981	1	0		
			2	0		
Jose	Journeyman	1979	4	153.5	308.54	27.63
Romero	Bricklayer	1980	1	135.75	272.86	24.44
			2	0		
			3	0		
			4	0		
		1981	1	0		
			2	0		
Ernesto	Journeyman	1979	4	0		
Romero	Bricklayer	1980	1	0		
			2	0		
			3	0		
			4	16.0	32.16	2.88
		1981	1	0		
			2	0		
Robert	Journeyman	1979	4	0		
Saenz	Bricklayer	1980	1	0		
			2	0		
			3	0		
			4	95.75	192.46	17.24
		1981	1	46.50	93.46	8.37
			2	0		
Felipe	Journeyman	1979	4	0		
Saenz	Bricklayer	1980	1	0		
			2	0		
			3	0		
			4	18.0	36.18	3.24